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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SABA CAPITAL MASTER FUND, LTD.,

Plaintiff,

v. 24 CV 01701

BLACKROCK ESG CAPITAL ALLOCATION TERM TRUST, ET AL.,

Defendants.

Oral Argument

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New York, N.Y.
June 12, 2024
2:00 p.m.

Before:

HON. MARGARET M. GARNETT,

District Judge

APPEARANCES

SUSMAN GODFREY, LLP
Attorneys for Plaintiff
BY: JACOB W. BUCHDAHL
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MARK P. MUSICO

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BY: TARIQ MUNDIYA
VANESSA RICHARDSON

STRADLEY RONON STEVENS & YOUNG, LLP
Attorney for Defendants
BY: MICHAEL DAVID O'MARA

(Case called.)

THE DEPUTY CLERK: Counsel, please state your appearances, starting with plaintiff.

MR. BUCHDAHL: Good afternoon, your Honor. For plaintiff, Jacob Buchdahl, Mark Musico, and Gloria Park of Susman Godfrey.

THE COURT: Good afternoon.

MR. MUNDIYA: Good afternoon, your Honor. Tariq Mundiya, Willkie Farr and Gallager for BlackRock ESG Capital Allocation Trust, Mr. Perlowski and Mr. Fairbairn. I'm here with my partner, Vanessa Richardson.

THE COURT: Good afternoon.

MR. O'MARA: Good afternoon, your Honor. Michael O'Mara from Stradley Ronon Stevens & Young on behalf of Trustees Hubbard, Kester, Egan, Fabozzi, Flores, Harris, Holloman, and Lynch.

THE COURT: Good afternoon.

So we're here today for oral argument on both Saba's motion for preliminary injunction, as well as the defendant's motion to dismiss. I just want to note for the record, as I said in a previous order, that I know Mr. Buchdahl. We served together in the U.S. Attorney's Office, and we've maintained what I would characterize as a friendly professional relationship since then, although we don't socialize independently outside of a group. Likewise, I know Mr. Feldman

quite well. We served in the U.S. Attorney's Office together, and the same, I frequently see him at professional events related to the U.S. Attorney's Office.

I see no reason why these circumstances merit recusal, but I just wanted to raise it at the outset and see if either party had any objection.

Mr. Buchdahl?

MR. BUCHDAHL: No objection on behalf of the plaintiff.

MR. MUNDIYA: Nothing from us, your Honor.

THE COURT: Great. So I propose we'll begin with Saba's counsel, and then give the defendants' counsel an opportunity to respond. I don't know, counsel, if you intend to speak separately or if one counsel is going to address -- is going to speak for the BlackRock defendants as a group.

MR. MUNDIYA: Your Honor, we will be if -- the BlackRock defense, and we'll do most if not all of the talking for the defendants' side.

THE COURT: Thank you.

I assume, Mr. Buchdahl, you are going to be arguing for Saba?

MR. BUCHDAHL: Your Honor, Mr. Musico is going to present argument on behalf of Saba Capital.

With regard to the witnesses, we do not intend to call them, and we understand from defense counsel they do not intend

to call them, unless your Honor wished to call them to question them.

THE COURT: No. I mean, I appreciate you updating my clerk about your intentions, but my expectation is we're only here for lawyers' argument, and unless something -- I think I have a good grasp of what the facts are, so unless something goes awry today or at the end of the proceeding either side feels like issues arose that would make witness testimony important before I make a decision, my assumption is we're only going to have argument today.

So then I'll turn my question to you, Mr. Musico. Do you want to reserve some time for rebuttal?

MR. MUSICO: I would appreciate that. your Honor.

THE COURT: I don't know if -- my general view is that as long as our conversation is proving interesting and helpful to me, I'm not a big fan of artificial limits on your time. But my general expectation is that you won't go more than 45 minutes, to start, same on the other side.

I'm going to have a lot -- I expect to have a lot of questions, so I think we're all best served by having our time devoted to my questions, but I think they'll come up naturally as we go. My expectation is that we'll be done in no more than two hours. Of course if we find we have a lot to talk about and it's interesting, then I'm happy to give you as much time as you need.

Any objection?

MR. MUNDIYA: No objection, your Honor.

MR. MUSICO: No objection, your Honor.

THE COURT: With that, Mr. Musico, you're up.

MR. MUSICO: Thank you, your Honor. Mark Musico on behalf of Saba Capital.

THE COURT: Do you want to speak from the podium?

MR. MUSICO: I'm fine here. My only concern is for the defendants to be looking at my back.

MR. MUNDIYA: It's fine. Whatever he feels comfortable with.

THE COURT: If you're comfortable there, that's fine. I would pull the microphone a little closer. We have this beautiful space, but the acoustics are not really good. So really for the reporter more than anything else, make sure you have the microphone close to you and straightened.

You can begin.

MR. MUSICO: Thank you, your Honor.

Your Honor, Saba asks this Court to enforce a foundational requirement of the Investment Company Act that directors of investment companies be elected by their shareholders. Defendants' reading of the statute, in particular section 16(a), is entirely atextual and inconsistent with the claim and purposes of Congress to protect shareholders' electoral rights.

In particular, defendants' reading would effectively read annual or special meeting out of the statute entirely, and defendants cannot explain how their interpretation of the statute is consistent with its provision that the term of at least one class of directors must, "expire each year." That provision strongly implies that Congress intended that there would be an election of directors each year, but, at minimum, the statute sets clear limits on the extent to which directors whose terms have expired without further election can continue to serve.

THE COURT: Well, is that really true? Right? I mean, I know throughout Saba's brief you want to characterize the expiration of terms as creating a vacancy, but isn't there some tension between that interpretation and Saba's concession that there's nothing inherently wrong with holdover provisions, which are common throughout corporate law, that when the terms of necessary managers or leaders of a corporate organization would otherwise expire, that no vacancy is created, because the term is deemed to extend until a valid successor is in place?

MR. MUSICO: So, your Honor, I want to make sure our position on holdover directors is clear. We have not made a direct challenge to the concept of a holdover director in the abstract, in all circumstances, but we were clear, including on page 14 of our opening brief, that the fact that ECAT will have seven unelected incumbents this year, seven incumbents whose

terms expire. We took the position, and this is a quote from our brief, "their continued presence as unelected holdovers is flatly contrary to section 16." And, on that -- sorry.

THE COURT: I just want to push you on this unelected characterization, because, as I understand the facts, those directors were elected within the meaning of the statute. I know you might disagree with that, but at a time when ECAT had only one shareholder, and so the directors were selected in the appropriate and lawful fashion by the single shareholder, and their status after that point is the status of the holdover director.

So what is the basis for characterizing those directors as unelected or directors who have never been elected?

MR. MUSICO: So, your Honor, I can come back to the question of whether these directors were, in fact, elected based on their appointment at BlackRock at the initiation of the fund, but to get to the question about whether they can continue to serve after their terms expire, respectfully, your Honor, we don't understand what the expiration of a term can mean if, by BlackRock's account, those directors can nevertheless continue to serve in perpetuity. That's effectively their argument, that because they were elected -- or their position is that they were elected at the creation of the funds, that thereby they can continue to serve forever.

And there is no way to reconcile that with the "expiration" of a term. There has to be a point, if a director's term is expiring, that they come back up for election by the shareholders.

Your Honor, again, I think we see this in defendants' own cited authorities, even the *Badlands* case out of the Fourth Circuit recognizes that to the extent holdover directors are a permissible feature of corporate governance, it can only be a temporary or "stopgap" solution. The full expectation of even the Fourth Circuit in *Badlands* is that holdover directors would -- at some point in time, when the shareholders have another opportunity to elect the directors, will in fact do so.

Even in the no action letter cited by the defendants, this is the ICI letter from 1992, the SEC staff expected that even if you count -- you recognized the appointment of directors at the creation of the fund, that they would later be voted on by the public shareholders. To this point, your Honor, though, whether that initial appointment even qualifies itself as an election, I will note that BlackRock submitted the consent of the sole initial shareholder for the appointment of the directors, and the language of that appointment is conspicuous, your Honor. It says that the trustees are appointed "as if they had been -- the resolution is adopted, as if it had been adopted at a duly convened meeting of the shareholders of the trust."

In other words, even the appointment --

THE COURT: Isn't that the standard language in written consent in lieu of a shareholder meeting?

MR. MUSICO: No, your Honor. Again, section 16(a) says, directors must be elected at an annual or special meeting of the shareholders duly called for that purpose. The initial appointment recognizes that it is a fix. It is not even an election at an annual or special meeting of the shareholders.

Your Honor, I will note again, even in defendants' cited authorities about whether the expiration of a term qualifies as a vacancy, the Fletcher treatise that they cite, section 344, recognizes that, "officers who were never officially elected as directors after the corporation's inception do not qualify as holdover directors."

And then in the Quilin treatise that defendants cite, section 12165, it recognizes that, under certain jurisdictions, it notes -- conspicuously, this is a treatise about municipal corporations, so we're already pretty far afield here, but even that recognizes that, "a legislative intent to depart from the doctrine that expirations are not necessarily treated as vacancies has frequently been expressed."

And, your Honor, we believe that intention, to the extent it needed to be made even clearer in the ICA, is clear, given that, again, defendants have provided no explanation for how a term can expire, but a trustee can, nevertheless, remain

in office in perpetuity. And so to come back to where we started, at most I think that you can read section 16 to tolerate temporary holdovers up to the percentage limits on how many directors of the fund must have been elected. That is the most natural reading of the statute.

And, again, to the extent there is any ambiguity, as we've argued in our brief, and as the Second Circuit recently affirmed in *Nuveen*, those ambiguities must be resolved in favor of shareholders' electoral rights.

THE COURT: Well, isn't your greater problem shareholder apathy, right, or lack of participation? Because, if I understand the facts correctly and the sequence of called meetings in 2023, the issue there was less the majority rule than the fact that no quorum could be reached despite, as I understand it, enormous effort and resources expended by both Saba and BlackRock.

So does that mean that the quorum rules are unlawful themselves if, in practice, getting more than 50 percent of outstanding shares to even participate has proven difficult, if not impossible?

MR. MUSICO: Your Honor, we don't believe there is any inherent illegality in the quorum requirement or not quorum requirement as applied to ECAT. It, of course, happens that in funds in certain years they don't reach a quorum, but unlike the standard for receiving the affirmative vote of 50 percent

of the shares outstanding, which while theoretically possible and in very rare cases has happened, clearly is not attainable in ECAT, a quorum requirement of 50 percent of the shares outstanding, just getting 50 percent of the shares outstanding to vote is fairly routine, and we do expect that that will occur in ECAT this year.

The issue with --

THE COURT: But the reason that you think it will -- that you'd be able to get over that threshold now is because Saba now has over 25 percent of the shares, so you only need another 25 percent to participate, to get there, right?

So if last year's attempted elections failed because of a quorum failure, right -- I mean, I recognize that, also, even if there had been a quorum, no candidate would have gotten more than 50 percent of the outstanding shares, but, ultimately, the reason that those elections did not occur is because there wasn't a quorum. So how does that create evidence that it's the majority rule, the majority election rule that is the problem?

Do you understand what I'm asking?

MR. MUSICO: I think I do, your Honor, but if I end up not being responsive to your question, I'm sure you'll let me know. In last year's election, you're right that it was the failure to get to a quorum that technically resulted in there being no election. We do -- as you recognize, we know from

that necessarily that also means that no candidate possibly could have received the affirmative vote of 58 percent of the shares outstanding. The issue is that the structural impediment to directors being elected in ECAT in a contested election is not the quorum requirement. We recognize that it is attainable and has been attained in the past and likely will be attained in the future, including this year. The structural impediment to having directors elected as required by the Investment Company Act is the voting standard that requires the vote be affirmative vote of 50 percent of the shares outstanding. And so, you know, I suppose we could have come in and sought an injunction against or revision of the quorum requirement as well after last year's election, but, you know, Saba is not here to just be obstructionist. Saba is here to try to allow shareholders to actually have bondholder -- their rights enforced to elect directors under the Investment Company Act. And we don't understand the quorum requirement itself to be what's standing in the way.

THE COURT: So just returning to this question of kind of shareholder apathy -- I don't even know if apathy is the right characterization. We don't really know. Right? There's the black box in which exists the shareholders in whom, despite great efforts by both parties, choose not to participate. So no one is suppressing those votes. Unlike in some of the cases cited by both parties, there's no effort to, at the last

minute, change the rules, move the meeting, cancel the meeting, make votes returnable in too short of a time so that there's some effective suppression of shareholder participation.

And so as we're puzzling through this problem, what weight should be given to the rights, really, the rights of nonvoting shareholders or non-participating shareholders who -- one possible interpretation is that they are using their shares and their rights as shareholders to produce, in effect, a continuation of the status quo, that they are expressing -- I don't know how familiar you are with sort of political science voting literature, right, but there's a lot of discussion that people act not only by going to the voting booth but also by choosing not to participate.

And so as we're thinking ultimately this is all about -- I think Saba's position is all about a policy that shareholders, all shareholders should have a say in the management of the fund. So given that, what should I think about what meaning to ascribe to or what weight to give to shareholders who knowing -- presumably knowing the rules, say, you know what; I'm good; everything seems fine to me; and the status quo is good; and I see no need to involve myself in this matter, because I, a shareholder, am comfortable with how things are; and if I do nothing, that will produce a continuation of how things are? So how should I think about that problem?

MR. MUSICO: Your Honor, our position on that is we shouldn't be making those kind of assumptions about what might be in shareholders' heads. The Act is structured to provide for the election of directors, not the assumptions that directors should be allowed to continue in office unless and until shareholders give some kind of affirmative indication that they want them out.

And, now, a couple of other points on this, your Honor. One is that we do have a pretty clear case that at least one of ECAT's suppositions about what shareholders want is incorrect. Their general thesis is that shareholders invest in these funds knowing that the capital is locked up, they can't redeem it, they're in it for the long term. That's entirely inconsistent with the fact that at least 25 percent of the shareholders, now close to 30 percent of the shareholders, were willing to sell their shares to Saba within the last two or so years.

Those -- we can certainly infer that those shareholders were not, in fact, interested in sticking with ECAT for the long term, but, more generally, your Honor, we don't believe that this ability to presuppose that nonvoting shareholders are comfortable with the status quo is consistent with the requirement of the Act that the directors actually be elected and that their terms expire. Again, the clear implication of those provisions is that they must receive

another affirmative vote of the shareholders in order to continue in office.

I'll also note, your Honor, you know, you made a comment about how given Saba's stake of about 25 percent, they only need to get another 25 percent. Well, it's -- you know, we look at that from the inverse, which is that if ECAT is correct that Saba is going to come in and do all these harmful things to the fund and harmful things to shareholders who want to remain in the fund for the long term, there's a whole 75 percent who could come in and vote for the incumbents. And they're well aware of the rules. They get all of these proxy materials. They're aware of what the standard is for actually electing directors. They still sit on their hands.

So the fundamental point is that given that we can't just make these suppositions about what shareholders may or may not be thinking, we have to enforce the plain terms of the Act, which is the directors need to be, in fact, elected at the end of their terms.

THE COURT: Is there some tension here like -- it's not totally clear to me whether Saba's position is that rule on its face violates the '40 Act, or whether the argument is that, well, while the rule on its face might be fine, in practice, in this particular fund, the rule produces a result that can't be reconciled with the '40 Act. And the answer to that question also interacts with this question of the statute of

limitations, with the question of like how I would know that we've achieved a system that complies with the '40 Act in the case of this particular fund, like if ECAT went to a majority -- let's say a majority of shares present and voting standard, and after multiple years none of Saba's challenging candidates succeeded in supporting management supported candidates, would that then be evidence that that system also was not effective to give shareholders a say in the operation of the fund?

Do you understand what -- I've packed a lot into there, but I think this tension between is the rule statutorily barred or can you only succeed based on the argument that, as the rule plays out, in the context of this fund in particular, it can't be reconciled with the Act?

MR. MUSICO: Let me start where you ended, your Honor, which is the question about, assume these directors replaced a majority of shares outstanding with a majority of shares voted standard, but Saba still wasn't able to nominate candidates who were able to unseat them. I think the answer to your question in that circumstance as to whether the standard is still unlawful is whether the incumbents have been able to be elected under that standard in those interim elections as well.

Saba is not just in here as a sore loser. Saba is in here trying to make sure that shareholders actually have their ability to elect trustees as they are entitled to do under the Act.

Stepping back then to your question of is this a facial challenge or is this an applied challenge, we do understand both types of challenges to be possible, but our challenge to ECAT's majority of shares outstanding standard is better characterized as an applied challenge. This type of challenge, your Honor, we understand to be contemplated clearly by the ICA. Section 80(a)(46)(B), which is the provision regarding the enforcement and revision significance of contracts that violate the ICA, specifically refers to the ability to invalidate contracts not just which are "made in violation of the Act," but also contracts, "whose performance involves a violation of the Act."

It's that latter type of challenge that we are pursuing here. The application of this majority of shares outstanding standard to ECAT is demonstrably operating in violation of the Act. That occurred at last summer's meeting, when four of ECAT's incumbent directors failed to be elected, and only 60 percent resumed one expired terms, and is imminently going to be the case after this year's election, when a full 70 percent of ECAT's incumbent directors will be continuing without election and expired terms and only 30 percent will have been in office actually having been elected without expired terms.

Because your Honor raised how this relates to the statute of limitations issue, first, before we get into the

doctrinal aspects of it, I just want to take a step back and think about what's at issue here in this statute of limitations question. BlackRock has accused Saba of being overly litigious, but their position that a challenge to a voting standard must be made at the time the contract is formed, at the time that a shareholder buys shares in a fund, is an invitation to spur investors to bring litigation about disputes that might never materialize. It would require investors to come in and sue immediately upon buying shares in a fund where they -- that has a voting standard that they think might someday result in directors not being elected at some future election that happens to be contested when no one even knows whether there is or will be a contested election on the horizon.

Respectfully, your Honor, we don't believe that there is a reasonable construction that would force investors to bring suits about disputes like that that might never actually materialize. And, you know, we know from the prior control share litigation against BlackRock that, if we had done that, they'd be in here saying we had sued too early, that we don't even yet have standing because we're trying to litigate some kind of abstract dispute. It would also just be a trap for investors.

It's entirely conceivable that investors would come into a fund, never have an intension of running a contested

election, never have an intension of putting someone up to replace the incumbents, things are humming along fine at the fund, then it turns out those directors start underperforming. They start, you know, enacting other unfair corporate governance rules.

At that point it turns out, hey, you know what, we need to try to replace management of this fund; we're disappointed. It's only at that point, at the earliest, that they would have a real reason to come in and contest a voting standard.

And if you look at the Second Circuit's decision in *Williams v. Binance*, for one thing, it reflects this categorical decision that a claim for recision always must accrue when the contract is formed, but it also recognizes that you have to look to when the violation occurs in order to determine when a statute of limitations starts to run.

THE COURT: So when does -- what is Saba's position on when the claim arose or when the claim could have been brought, first brought?

MR. MUSICO: So I actually think there is -- I think the case law is a little loose with that language, your Honor, and I do think there is a little bit of room between when the violation occurs and the claim accrues for purposes of statute of limitations purposes, and when a potential plaintiff might be able to bring suit.

And I think you see exactly that dynamic in the *Nuveen* case recently decided by the Second Circuit. The actual representation -- we can talk about *Nuveen* if it's helpful, but in this case, the actual violation occurred at last summer's election, when the directors failed to be elected by the shareholders as required by section 16(a).

If we're being precise about it, I actually think the violation didn't happen until the very end of 2023, because that's when that class of directors' terms expired. So it's after that point that resuming in office without election triggered the violation of section 16(a). That's a little different, your Honor, than the question of when a plaintiff may be able to bring suit. And this is the issue that the Second Circuit addressed in *Nuveen*. Standing doctrine recognizes the ability of a plaintiff to come in and seek relief to prevent imminent and anticipated future harms from occurring, but the fact that a plaintiff can come in and do that, to try to get relief before the harm even occurs, doesn't mean that their calls of action and that their statute of limitations starts to run before the harm has actually occurred and the violation has actually been perpetrated.

THE COURT: Okay.

MR. MUSICO: Your Honor, I'm happy to address issues --

THE COURT: Well, I have many others questions, but I

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MR. MUSICO: No. No. Please. We are very confident in our briefing, and I hope we've laid out the issues as clearly as we can, so I'm happy to use as much of my time as you'll indulge to answer your questions.

THE COURT: Sure. Just sticking with the merits for a minute, before we go on to the other factors, and just returning to this question about how to think about non-participating shareholders, I think throughout Saba's briefing there is a through line, right, that in effect, in practice, these rules give a greater voting weight to the shareholders who prefer a continuation of the status quo, and that's not fair. I think that that's a bit of a stretch in the language of the '40 Act, because every share still has one vote. It's a little bit like a Republican voter in Brooklyn who says it's not fair because the people who prefer democrats keep winning, and the problem is you can't convince enough of your fellow citizens to vote the way you would prefer things come out.

So looking at just the language of the Act, it's a little bit of a stretch to say that those shareholders who prefer status quo sometimes have a greater say, but just sticking with that theme for a minute, is it true or what would be your response to a view that Saba's proposed rule or preferred voting rule would produce the opposite effect, right?

A sort of -- a reliance on the fact of either shareholder apathy or widely diffuse and disbursed ownership as weighed against Saba's concentrated ownership to try to give themselves a single holder of approximately 25 percent of the shares now an outsized voice or say.

So the fact of low shareholder participation can be viewed as two ways, right? I think, in Saba's view, the current rules say, well, all those people get greater say, because everything works to continue the status quo, and people who want the status quo to continue can easily get what they want, but isn't an argument that Saba's proposed rule takes those very same facts and inverts them to give Saba an involved, sophisticated, concentrated shareholder who certainly should be allowed to vote their shares, and you succeeded in getting that part of the case in front of Judge Rakoff, that you can vote all your shares without limitations.

But what is your response to that argument, right? That taking your same theme and looking at it through a different lens, the rule you're proposing is designed, uses those same underlying facts to gave shareholders like you a greater say.

MR. MUSICO: So a couple points, your Honor, and, first, I just want to start with a framing point. This disproportionate voting theory only applies to the second prong of our section 18(i) arguments. Right. We have our 16(a)

argument about election and expired terms and whether the directors in fact need to be elected by the shareholders or whether they can just sort of carry on by fiat. We have our section 18(i) arguments. The first prong of which basically overlaps with our 16(a) theory, which is that voting in an election that is really just an election in name only, where the outcome is preordained from the start by the director -- by the incumbent's voting standard, that -- that's a fictional vote, and so can't comply with 18(i) in that respect.

So we're only now talking about our third alternative theory about disproportionate voting power, and to answer your question about, well, can't you just say the shoe is on the other foot, I don't think that's quite right, your Honor, because under ECAT's majority of outstanding standard, the vote of one percent of shareholders can defeat the vote of 49 percent of shareholders, and that's the sense, as we put it in our brief, the voting power of that one percent is essentially super marked. It is allowed to trump the votes of a vastly larger number of shareholders.

On the flip side, as you're saying, you're right that Saba is the largest shareholder in ECAT, but there is no sense in which its shares are being given any greater voting power than anyone else's shares. Now, I have to also say, your Honor, the assumption in your question seems to be that our proposed remedy here is that the fund must adopt a sort of

plurality voting standard. As you know, we haven't taken that position. That's not the relief we're requesting. We do think it is the most natural and appropriate solution, but, again, it's at least theoretically possible that ECAT's directors could take a look at the fund, take a look at shareholder voting patterns, and find some other voting standard, other than a plurality, that is actually attainable, but that might still in some sense favor the status quo, at least theoretically.

The difference, your Honor, is that the incumbents have set up a standard that they themselves cannot meet, right? And that is what is so offensive about the majority of outstanding standard and in particular this tiered standard. The incumbents want the plurality in an uncontested election, so when they stand for an election unopposed, they can say, look, we -- overwhelming victory by the plurality of shares.

So, as is now occurring, when there are contested elections and directors' terms start to expire, they have a backstop of at least the three directors in this case who are actually in plurality. But what they refuse to do is when there is a contested election, create a standard that someone can meet, right? But the standard they have set is one that can't be met either by a challenger or an incumbent, and we know from the evidentiary submissions we've given you, your Honor, and this came out in the discovery in the *Eaton Vance*

case, there are these rare cases where candidates get to 50 percent of the shares outstanding. It's very rare. They're very unusual circumstances. But in one of those funds, it was the Cabelli election, it was the incumbent who received the vote of 50 percent of the shares outstanding. So if the -- if ECAT's directors are so insistent about having a heightened voting standard, it should at least be one that they themselves think they are capable of meeting.

THE COURT: Don't these claims really fit better or sound more in a breach of fiduciary duty argument? I don't mean to give you legal advice. Right. You've brought the claims you've brought, and I don't know -- but I'm quite confident Mr. Buchdahl's a better lawyer than I am, but the fitting of this argument into the statute language of the '40 Act seems to me a little bit like a square peg in a round hole, right?

Normally, the thing that depends on the evidence, of how things actually work in evidence, are brought as a sort of vibe's based claim, for lack of a better term. Like a breach of fiduciary duty claims or common law rooted claims like that typically depend more on, look, this is how things are actually working in practice. As a factual matter, that demonstrates that the directors are not running the fund in the interest of shareholders, right?

Maybe you can't answer this, but it's curious to me,

right, that we're -- usually a statutory challenge, it fits more in the box of the rule on -- the statute prescribes X, particularly the 33 Act, 34 Act, 40 Act, right, and the governing structure of the fund, it's governing documents, its rules are not lawful when you look at the requirements of the statute. So maybe circling back to the few questions ago about whether this is an as-applied type of challenge or in-practice challenge, why aren't we talking about this case in -- through the lens of a breach of fiduciary duty that the directors owe to all shareholders?

MR. MUSICO: So, your Honor, there --

THE COURT: I mean, I know you haven't brought those claims --

MR. MUSICO: Yeah.

THE COURT: -- no doubt for good reasons, but how does this fit in the claims that you've brought?

MR. MUSICO: I think I should start by saying, as you know from our complaint and our briefing, we do -- I believe that the text and mandates of the statute are clear and enforceable and correct, and that is of course why we've brought them. But I don't want to suggest that there may not be potential state law breach of fiduciary duty claims here. That, of course, doesn't mean we needed to assert them, but I think the easiest way of answering your question, your Honor, might be to look at the *Eaton Vance* case, which dealt with

Saba's challenge to a very similar majority of shares outstanding voting standard. Saba brought claims in this case for breach of fiduciary duty, breach of contract, and for violation of the Investment Company Act. At summary judgment, the breach of fiduciary duty claims got dismissed. The breach of contract claim survived, and the breach of contract at issue, that Saba was claiming a breach of, is conspicuously similar to the language of the '40 Act itself, calling for the election of directors. The ICA claim in *Eaton Vance* is also alive. I believe it wasn't even challenged at summary judgment.

So that case is set for trial this fall, and, your Honor, why the -- why the Investment Company Act is arguably the best fit for this case is that in addition to the clear mandate that the directors must be elected by the shareholders, there is this schema of what happens when an insufficient number directors in office have been elected by the shareholders. And those are the levels that we see ECAT falling below in last year's election and now in this year's election.

So it's -- the scenario that section 16 says is impermissible is exactly the scenario that is playing out in ECAT, and that's why that's the right claim for this case, your Honor.

THE COURT: Okay. I'm turning to the irreparable

harm. I guess, first, before we maybe even get there, BlackRock indicated a number of times in their briefing that they believe that the proper standard is a somewhat higher standard than the default preliminary injunction standard, because the relief that Saba is seeking is essentially a complete relief as to all claims, as well as change the status quo, and -- rather than to prevent the responding party from doing something. So I think let's start there.

Do you agree with BlackRock? Do you agree that the somewhat higher standard that they've articulated in their brief is applicable to this motion?

MR. MUSICO: Your Honor, we certainly believe we satisfy that heightened standard, and we do agree it applies to the extent BlackRock is incorrect about the availability of post-election remedies. And so, you know, BlackRock is talking out of --

THE COURT: Explain that to me.

MR. MUSICO: Yes. BlockRock's talking out of both sides of their mouth when they say, Saba, you can't show irreparable harm because after the election you can always basically get a do-over. You can get another election under a different standard, and you can get our people taken out of office, so on, and so forth.

To the extent that's true, it should apply equally well to BlackRock where, if this Court invalidates the voting

standard and whatever voting standard this Court puts in place allows Saba's nominees to be elected but this litigation continues and is ongoing, by BlackRock's own logic, they should be able to come and say, well, no, this litigation is still continuing and that voting standard is wrong, and so we should be able to remove Saba's nominees and put or directors back in.

So we disagree with that position about the availability of post-election remedies, but that's BlackRock's own position. And so if they really mean that, then they can't seriously contest that, you know, giving us relief now would irrevocably give us everything we are entitled to. Those positions are inconsistent.

That said, there is irreparable harm here, and Saba has demonstrated both the substantial likelihood of success on the merits and a strong showing of irreparable harm. And --

THE COURT: Let's pause on that for a moment, because I'm curious to hear your best argument for why leaving in place the rules that existed when Saba purchased its shares until this litigation can play out fully on the merits, how are leaving those rules in place irreparably harming Saba's interests or the interests of other shareholders generally?

MR. MUSICO: Yes, your Honor. We have cited cases from across the country, specifically Delaware and Massachusetts, as well as federal cases, allowing directors who have not been actually elected by the shareholders to continue

in office and continue to take actions on behalf the fund and on behalf the shareholders. Every day they do that without being properly elected is an irreparable harm to the shareholders.

If we end up down the road, and as -- your Honor finds that the voting standard was, in fact, invalid and BlackRock's director shouldn't have been able to remain in office, in that interim period, they're going to continue to make any number of decisions on behalf of the fund, and the question will be have all of those actions been ultra vires? Do we need to try to unwind all of them? That is why, in these cases about elections of directors, Courts routinely find that depriving shareholders of their right to vote, and specifically their right to elect directors, is categorically an irreparable harm.

THE COURT: But don't all or at least the majority of those cases that you've cited involve situations where the existing board or existing directors have themselves taken some steps to prevent election? Right? We're canceling the meeting, we are changing the proxy rules, we are eliminating board seats, something that is -- as opposed to I think the situation we have here, and, frankly, the situation that existed last summer, right, like a quorum could not be reached, the existing directors carried on. So isn't there -- or I guess maybe not isn't there -- is there some fundamental difference, meaningful, substantive difference between a

circumstance in which the status quo continues for some amount of time that it takes to bring this case to sort of ordinary conclusion, versus the cases that you primarily rely on, which I agree, it can be characterized as something is happening that is depriving shareholders of their right to control the people who control the company. But is there something substantively different between actions being taken by incumbents to change, diminish, alter the rights of shareholders, as opposed to the situation here where even if the current situation is a bad one, it's the one that you bought into and it's just going to -- the existing situation is just going to stay in place until the case plays out in its ordinary course?

MR. MUSICO: So, your Honor, I see the distinction you're making, but it's one that I don't think makes a difference with respect to the issue of irreparable harm. So the fact patterns you're describing where directors are changing the rules midstream and doing those sorts of things, those are the types of cases, going back to your earlier question, that typically tend to sound in breach of fiduciary duty. That's one difference. That's why I think you see most of those cases being brought as breach of fiduciary duty claims. They might also go to the issue of balance of the equities.

This issue of maintaining status quo or changing status quo I think is typically analyzed under the balance of

equities problem. We can get to that in a second, because we do think the equities clearly favor granting injunctive relief to Saba as well, but on the issue of irreparable harm, I don't believe there is a difference, your Honor, because however the incumbent director has managed to do it, whether it's a change or whether it's a rule that they put in at the initiation of the fund, or whatever it is, if it's a rule that is disenfranchising shareholders, that is creating these failed elections that happened last year, that is going to happen again this year, the harm to shareholders of not having a say in the election of their directors is the same. Reordaining the results of an election in favor of the incumbents is always irreparable harm.

As to the balancing of the equities issue and this issue of, you know, maintaining status quo or change the status quo, I take the point that we are seeking a change in the voting standard, but there are a number of ways in which that isn't the status quo. Status quo, prior to last summer, was applying a plurality standard in the one uncontested election that happened. The status quo before last summer was that ECAT had an entire board full of people without unexpired terms, right? Who were still duly serving their term. That is what changed last summer, and that is the deviation from the status quo.

With respect to the equities more generally, your

Honor, there are a number of issues floating around about is Saba coming in and taking self-interested actions and trying to help it, you know, enrich itself at the expense of long-term shareholders. It's not true. Saba is coming in, seeing an opportunity to unlock value for all shareholders, but putting that aside, it's an issue that is completely water under the bridge after the Second Circuit's decision in *Nuveen*. Pages 120 and 121 of that opinion in particular, footnote 17 and 18, go through this entire analysis about the policies and purposes of the Investment Company Act and concluded that they favor Saba, that the Investment Company Act always favors protecting the interest of shareholders and their voting rights over the entrenched interests of incumbent management. It is an issue that is now settled in this circuit, and --

THE COURT: Right, but isn't there a difference between -- I definitely take your point that this will be a preview, but I don't really put much weight on the characterization of Saba as an act of a shareholder, whatever that even means. You have a right to vote your shares, however many shares you have. That's well established. The characterization of the motives of such a shareholder are, it seems to me, largely irrelevant to these questions. But I think there's also an overstatement on Saba's part on how to think about the balance of equities. Essentially, who is on which side, who is on the other side of the scale, right?

Okay. Clearly, Saba is on one side, and, arguably, the interests of other shareholders who may share Saba's goals, but I think the lens through which you've presented the balance of equities and the cases that you cite is that the other side of the scale is solely in the interest of current directors in staying in their position. But it seems to me that that's maybe not quite right, because I think what BlackRock would say is that -- and not just BlackRock itself, but the BlackRock defendants generally, including the current board members, is no, no, as current board members, we have a fiduciary duty to act on behalf of all shareholders, and including the shareholders who aren't present as parties in this litigation, who bought into -- I'm just speaking on their behalf, not necessarily adopting it -- but who bought into a fund that was structured in a certain way, that is maybe a little bit sleepy but is providing steady returns, and those folks want their money in a vehicle that has a status quo bias, that is, management maybe has an outside say, but they, as shareholders, are choosing that, right?

So is it really right to say that the balance of equities assessment is the way that you've presented it? Right? That it's Saba on one side, and the other side is only the interest of current directors remaining in their post sort of for themselves?

MR. MUSICO: Your Honor, respectfully, that is exactly

the debate that happened in *Nuveen*, and when the Second Circuit found that the policies and purposes of the ICA favor Saba's position, that's not to say that there's necessarily nothing on the other side but it's that, when you look at the totality of the circumstances and you look at the policies and purposes of the Act, they favor Saba's position about voting rights and electoral rights, and, specifically, on the issue you raised, your Honor, it's footnote 18 of the *Nuveen* decision that specifically addressed this issue of concentrated shareholder and whether that is -- whether management can appropriately take steps to combat concentrated shareholding.

The Second Circuit said, look, we get it, but even if there is attention there, I have to come down on the side of giving shareholders the opportunity to actually elect their trustees, and the language that the Second Circuit used was, give shareholders the opportunity to choose new directors when they cease to meet with their approval.

And so, you know, I don't want to rehash points we've already discussed, your Honor, but it does come back to this point of, if they're right, if there really are so many of these shareholders out there who like the incumbent management and want the fund to stay on the course that it's on, they should get them to come out and vote for the incumbents. That's especially true when, until recently, BlackRock was the only party in this proxy fight with the Noble list, the list of

the shareholders to go out and contact. And you better believe BlackRock was out there pounding the pavement, trying to turn out their every vote they can, and they couldn't do it.

So, at this point, again, when you're going to have only 30 percent of the board whose terms have not expired, we need some affirmative indication from the shareholders of who they want running this fund.

THE COURT: Okay. So I have one more question just on the public policy arguments or what's in the public interest. So Maryland's corporate statute says, as a default, right, like companies can adopt other rules, trusts can adopt other rules, but if they haven't adopted other rules, then the default is that majority of all shares outstanding is the default for shareholder expressions of their preferences or changes that require shareholder approval.

So does your public policy or public interest argument mean that essentially all Maryland investment trusts who have adopted Maryland's default rules are operating unlawfully and against public policy?

MR. MUSICO: No, your Honor. So, for one thing, that statute in Maryland, the statute's general application, we're specifically here talking about the subset of companies that are regulated under the Investment Company Act. I think our position on this issue, I'm not sure I have a lot to add to our briefing, but, as you know, we've argued that the Maryland

default rule specifically gives statutory trusts leeway to deviate from it. So it is in no sense a requirement of Maryland law, and, as you know, defendants already have deviated from it in the case of an uncontested election, in holding only themselves to a plurality standard, while any time anyone comes in and challenges them, they create this heightened standard.

So the idea that they are, you know, going to seek cover in Maryland public policy, for lack of a better word, your Honor, it's a joke, because they have already deviated from it. They've already abandoned the cover of Maryland public policy when it benefits themselves.

THE COURT: Isn't that really the issue?

I guess is this a question really for Mr. Mundiya more than you, but isn't the real issue here having two different voting standards for when an election is contested and when it is not?

MR. MUSICO: Now, I'm not sure I understand the question, your Honor.

THE COURT: Well, to jump off from your point that the fund has put in place a rule that says, where there's only one candidate for each seat, you only need to have a majority of the shares present and voting, whether by proxy or physically present, and then they have a different standard for a contested election, I mean, isn't that gap really the issue?

What if the fund had the same majority rule for both contested and uncontested elections? What would Saba's view be of that rule?

MR. MUSICO: Your Honor, the gap is telling, but I do think we'd have a problem even if the standard across the board were majority of shares outstanding, and if these directors, even in an uncontested election, couldn't muster the shares, get -- you know, muster, getting the votes of the shares -- of 50 percent of the shares outstanding, right? That is what is inconsistent with 16(a). They'd be setting up a voting standard where they are not being affirmatively elected by the shareholders, even after their terms expire.

If they can't -- in some sense, your Honor, I think the problem is even more exaggerated. If they can't even get shareholders to come out and vote for them when no one is even stepping up to say they're doing anything wrong, then we really have a problem, then something is functionally completely off the rails, and I think, yeah, we'd be in the same boat.

THE COURT: So before we switch parties here, I think maybe the last issue, it would be helpful for me to have you address the argument about delay and that Saba is here asking for extraordinary relief out of the ordinary course when, if they had only raised the issue in August, September, October of last year, when it became clear that no election was going to occur in 2023, that there would have been time for this to play

out in the ordinary course, and that that should weigh against Saba's claim of irreparable harm when they've delayed unreasonably.

MR. MUSICO: Yes, your Honor. We don't -- there's been no unreasonable delay here. When the meeting was adjourned in August, Saba had no reason to believe that that was the last shot at it. The fiscal year ran through the end of 2023. The ICA, ECAT's own bylaws, New York Stock Exchange rules, said the fund had to have a meeting in 2023. We obviously have a dispute about the ICA, but there's no dispute about the bylaws and about New York Stock Exchange rules.

Under the rules, they were obligated to have that meeting. We saw them adjourn the meeting twice before. Our only reasonable expectation from that was that they would keep trying. It was only by the end of the -- by the end of the year that they didn't actually get anyone elected during their -- before the expiration of their term.

Even putting that aside, your Honor, we are -- we did file suit at least four months before when we anticipated the election to occur. As we know from last year's meeting, there was a possibility of adjournments, that this, that, you know, meeting would actually not conclude until later in the year. Potentially even, you know, later than it happened last year. So there was ample time to have this resolved in an orderly fashion.

As you've seen from the way this is playing out, defendants had an opportunity to respond to Saba's motion on an even longer schedule than is typically allowed under the rules. They chose not to submit anything in response to our evidentiary submissions, but there was ample time to have done so. But maybe most importantly, your Honor, it's not clear what else there is to be done. The main dispute at this point is whether the Investment Company Act actually does what we say it does, which is require them to have directors who are actually elected.

This case is unlike, you know, *Eaton Vance*, which has gotten a lot of discussion in BlackRock's briefing, and to some extent in our argument today, where we were to some extent doing that predictive exercise, where Saba was trying to get relief in advance of harm actually occurring. Here, the harm is happening in realtime. We're seeing, in last year's election, the director's failing to be elected. We're seeing, in this year's election, no dispute from BlackRock that no one's going to get elected. And so we're in the scrum is what I'm trying to say. And so, inevitably, in the event these things are happening in realtime, you're always going to be a couple months after or a couple months before an election -- there's no sense in which we unreasonably delayed before or after another one of them.

I'll say, your Honor, in response to a number of cases

that they've cited on this delay issue, they are readily distinguishable, particularly on the equity issue. Those issues involve delays of several years. The ones who deal with elections, several of them involve parties letting several elections pass before they even came in to change the rules at issue. And maybe the most important through line of those cases is the plaintiff comes in and sues so close to the election at issue, or sometimes it's a parade, it's so close to the event, you know, usually like a couple days before, that the request for relief would disrupt the event itself. Right?

Someone is looking to completely change a ballot, or get someone else nominated, or, you know, have someone be able to protest at a parade. There's types of things that would disrupt the event.

THE COURT: Render the election impossible, right, like the election could not go forward as scheduled if relief were granted, whereas I think is Saba's position would be if the relief were granted, the election could still go forward this summer, just under different rules than exist now.

MR. MUSICO: And to be clear, your Honor, the election is happening. The meeting is the day the votes are finally tallied and counting, but shareholders are already voting in this process. So nothing is disrupted in terms of the conduct of the election. We're only here to figure out what rules will be applied to determine the winner and hopefully have a -- make

sure that the ECAT applies a standard that actually allows someone to emerge from these elections a winner, as the ICA clearly contemplates will be the case.

THE COURT: Okay. So, Mr. Musico, anything else that you would like to say while you're on your feet that I haven't given you a chance to say with my questions?

MR. MUSICO: Your Honor, I appreciate your time. I hope I was helpful in responding to your questions, but I will save the rest of my time for rebuttal.

THE COURT: Okay. Great. This has been very helpful. Thank you.

Because I want to give the reporter a break before too long, and I don't want to interrupt your presentation, Mr. Mundiya -- am I pronouncing it right?

MR. MUNDIYA: That's perfect, Mundiya.

THE COURT: All right. I'm going to give myself a gold star.

Why don't we take a brief break, and give the reporter a little break, and resume at 3:30.

All right. We are adjourned. Thank you.

(Recess taken.)

THE COURT: You can be seated. Thank you.

MR. MUNDIYA: Your Honor, I have a few slides. You may or may not refer to them.

THE COURT: I'd love a hard copy if you have them.

Thank you.

MR. MUNDIYA: Thank you.

I have one for my friends here, and one for your clerk. Thank you.

THE COURT: Thank you.

MR. MUNDIYA: So, your Honor, let me begin by maybe procedurally framing the case. They moved for a preliminary injunction, extraordinary relief. We think it's mandatory, we think they need to satisfy the highest standard, but I'm also going to address the 12(b)(6) motion that's part of my likelihood of success on the merits prong, because we think they both dovetail together sufficiently that way. We don't think they state a claim, and so the case should be dismissed as a matter of law under 12(b)(6), and the injunction should be denied under the heightened standard in the Second Circuit.

Let me focus on one of the things your Honor asked my friend, Mr. Musico, which is why federal law here -- what are we doing talking about section 16(a) and section 18(i). This is a one-count complaint effectively, a section 47(b) complaint under the '40 Act. This is a claim for declarative relief. But section 47(b) is the vehicle through which they're saying that 16(a) and 18(i) have been violated.

I'll get to a threshold issue in a bit about whether they even have standing to seek injunctive relief, because I think that's an important threshold issue given the limited

private right of action that the Second Circuit has held in *Oxford University Bank* as to claims for recision. We actually don't think they have standing to seek an injunction. That is a cause of action that belongs to the SEC, and that's -- I don't want to spend too much time on that, but we think it's a threshold issue.

But the point is there's no state law claim for breach of fiduciary duty. There's no state law claim for breach of contract. And so we have one federal claim, and in order for you to grant this extraordinary relief, they would need to show that, one, they have standing; two, that their claims are not barred by res judicata, statute of limitations, laches; and also that the '40 Act actually says what they say it says.

They then have to show strong irreparable harm. They then have to show the equities are in their favor, and they have to run the table to get that relief. They have to win on one of those issues to get this extraordinary relief. And we don't think they meet any of those standards.

But before we get to those elements, the one thing that I think you see from what Mr. Musico has said and from their briefs and from our briefs, what they're asking for is really very novel. It's unprecedented. We aren't aware, and I don't think they're aware of any case law ever in which a claim under 16(a) or 18(i) has been found to somehow violate a voting standard. It's not surprising, given that the Supreme Court

has held that states are the primary regulators of the corporate -- of corporate law. Internal corporate affairs are really issues of state law, and unless you can find a clear and manifest intent to preempt that, state law governs.

And we could spend all day, all afternoon, all evening looking for that clear and manifest intent to preempt state law. You wouldn't find it. There's nothing in 16(a). There's nothing in 18(i). There's nothing in (i) that says state law doesn't apply. There's nothing in those provisions that talk about a voting standard.

And one of the things Mr. Musico did not talk about this afternoon is the fact that in the '40 Act, there are multitudes of instances where Congress has outlined what the voting standard is. And I'm going to go a little bit out of order here, your Honor, but if you go to slides 6 through 11, we have a -- just a slough of examples where Congress has said that you would require -- when you would require a vote of a majority of its outstanding voting securities, when you want a change in investment policy, when you want to affect the contracts of advisors and underwriters, when you want to change and affect the capital structure of investment companies, when you want to impact close-end companies. That's section 18(a)(23). When you want to deal with accounts and auditors.

I mean, all of this, all of these provisions include a vote standard. So if Congress had wanted to have a vote

standard in 16(a) or 18(i), it could have done so. And we have case law in our brief that shows when Congress uses a particular word or standard in one section of a statute but doesn't in another, that's some indication of what Congress's intent is.

THE COURT: Right. But let me ask you this question, setting -- I agree with you that I don't think that the '40 Act prescribes a particular method of voting or way of counting or standard, but I think kind of the gravamen of Saba's argument is less than that this particular standard by itself is unlawful, but, rather, that any standard, a standard, whatever it might be, that produces these results cannot be consistent with the '40 Act.

So I guess my question to you is how long can this situation continue before BlackRock would concede it's a problem? Right?

So let's imagine that year after year Saba, or some other shareholder, or someone comes out of the woodwork and says, boy, I'd like to be on the board of this fund, and they -- I actually don't know how someone becomes a nominee for a spot. I don't think it matters. They're contested elections. A contested election triggers this majority of all shares outstanding standard or whatever the standard is, right? It triggers a standard for a contested election, and year after year that standard can't be met. So the existing directors are

in a holdover status.

Is there any point where that's a problem, given the requirements of the '40 Act for the governance of funds of this type?

MR. MUNDIYA: I think I have two responses to that. One is that situation is a function of what your Honor identified at 2:00 this afternoon, which was that's just a function of maybe voter lack of engagement, of voter -- I think you used the word apathy, but the fact that shareholders decide not to show up to vote is itself an expression of choice.

Those shareholders know what the vote standard is. They bought into these funds knowing of the long-term investment horizon. They knew the consequences of not showing up and not voting. And if that is -- if holdovers are the consequence of voter lack of engagement, because that voter decides that he or she is okay with the status quo, that's consistent with voter choice, it's consistent with the board's fiduciary duties.

However, if there was a -- if there did come a point where directors who were elected initially, to be sure, continue as holdovers, if shareholders like Saba wish to challenge that, there is a vehicle for that under state law. They could go to Maryland State Court and address those issues, either as a breach of fiduciary duty, a breach of contract, what have you. One the questions you asked Mr. Musico is why

not a fiduciary duty claim? Why not go to court and say, this is outrageous? What's going on? The reason they couldn't do that is because they would be litigating in Maryland State Court.

There is a forum selection clause in our organizational documents, and they don't want to be in Maryland Court, because they know, consistent with Maryland law, that they would have a hard time finding a judge, certainly on the basis of one election, that says there's a breach of fiduciary duty. But there are remedies for them under state law, just not under federal law.

So to answer your question, there might come a time where shareholders such as Saba wish to displace the directors under some law, but that law is not the law of 16(a), it's not the law of 18(i).

THE COURT: Well, so does that mean that your answer to my question is that 30 years of holdover directors would not violate the '40 Act?

MR. MUNDIYA: We're not talking --

THE COURT: Is there no point at which a board composed entirely of holdover directors would violate the '40 Act?

MR. MUNDIYA: That's not the case before us.

THE COURT: But it's a question I'm asking you, because I think it is a relevant question.

MR. MUNDIYA: It is a relevant question. At that point, perhaps the SEC would get involved, perhaps there would be a regulatory issue. But, certainly, it's not an issue that the private shareholder would have standing to bring. So we're not saying that that wouldn't be an issue. It might be an issue for some other body, but --

THE COURT: Right. So I think, if I'm right, their answer is if that situation were to come to pass, it doesn't -- it wouldn't change your fundamental point that individual shareholders couldn't bring that action.

MR. MUNDIYA: That's right.

THE COURT: At least couldn't bring that action under the '40 Act.

MR. MUNDIYA: Under the '40 Act for sure.

THE COURT: Okay. What if -- I know this is not the facts here, but I just want to push you a little bit. Even directors of BlackRock don't live forever, so vacancies are created, because they die, they say, you know what, I don't want to do this anymore, I'm moving to Florida to play golf, whatever. I guess you could probably move to Florida and play golf and still be a director of this fund. But if there are vacancies, I mean, I think we would all agree, you'll tell me if you don't agree, but that vacancies, actual vacancies, not term expiration but vacancies created through death or resignation can never be more than a third of the --

MR. MUNDIYA: Right.

THE COURT: -- board, because I don't know what the ECAT rules are, but I would assume most funds have a vacancy replacement, a mid-term vacancy replacement practice where a majority of the board, or some other means, can appoint directors, right? Typical --

MR. MUNDIYA: That's right, as long as -- sorry. I didn't mean to interrupt you.

THE COURT: No. That's fine.

So if there are vacancies, and the elections to fill those vacancies are contested ones, and they result in a null set, no candidate has successfully won, then what happens?

Does the board just dwindle down to zero? That can't be right.

MR. MUNDIYA: No. The vacancy would be filled by the directors, and as long as the board consists of two-thirds of directors or trustees who were elected by shareholders, those vacancies can be filled by the existing trustees. And then those trustees that were -- whose vacancies -- who assumed those vacancies, they would be up in the next class.

So if they were Class 1 or Class 2 or Class 3, they would then come up with a natural course at the next election, and if there was a contest, it would be a contest for those trustees. And if there was no contest, it would be uncontested. But those trustees would be -- those vacancies

would be filled. And so long as the board existed of two-thirds of trustees who were elected, then those new directors would then be up for election in the normal course.

But here every one of these trustees was, in fact, elected and will serve until their successor is elected. So there were no -- and I know your Honor -- I think your Honor agrees with me there were no vacancies here, right? They were all trustees until the successor elected. So there's no vacancies. They will continue until successors are qualified and elected. And that may happen this year. It may happen next year. But the fact that voter lack of engagement may mean that it may not happen for some time doesn't mean that they have a cause of action under 16(a) or 18(i).

THE COURT: I've taken you off course, so go ahead.

MR. MUNDIYA: I'm sorry. I actually prefer that. So when we get to the standard to seek an injunction, strong standard, and because we don't think the S -- they don't have standing, the SEC does to seek injunctive relief, that may be the end of the case for Saba.

The two things they say is because 47(b) has a -- talks about recision, therefore, they have a right to seek injunctive relief, that one form of equitable relief is consistent with another form of equitable relief, we don't think it's right. We would refer your Honor to the *FTC* case where the FTC tried to make a similar argument, and in that

case, the Supreme Court said quite clearly that just because the SEC has -- the FTC, rather, has the ability to seek permanent injunctive relief does not give it a right to seek disgorgement.

And under *AMG Capital* and the limited private right of action they have under *Oxford University Bank*, we don't think they even have standing to bring a claim for injunctive relief. But let's assume that they do. Let's turn to section 16(a) and talk a little bit about the merits. 16(a) makes it pretty clear, and that's -- this is slide three. Thank you.

THE COURT: I'm there.

MR. MUNDIYA: No person shall serve as a director unless elected to that office.

And if we go to slides four and five, I don't think there's any question that they were elected consistent with section 16(a). 16(a) says, at a meeting, annual meeting or special meeting. Maryland law says that if you have a special meeting, it can be -- it can occur through a written consent.

Your Honor asked Mr. Musico, isn't this written consent consistent with every other written consent that we see, and it frankly is. And so you have a written consent that is the equivalent of a special meeting under the '40 Act, consistent with our bylaws. So I don't think there's any genuine question that these trustees, all of them, slide five, all of them, were elected, and that terms expired in 2022,

2023, and 2024, and there was an election in 2022. It was uncontested. It was after the public shareholders did vote.

And then in 2023, there was a lack of a quorum, so they held over. And so all of these trustees are up for election in 2024. And Saba, if it wins under its new standard, will take control and then do with the fund what it has done at other fund complexes.

Now, you know, we agree that Saba is a 28 percent stockholder. We agree that it has a right to vote. But the notion that there's no irreparable harm here if they take control is fanciful. I mean, this is a clear case of irreparable harm, and the balance of hardships that's decidedly in our favor.

We have had a voting standard that has been in place since the day this fund was formed in 2021. In 2020, they challenged an identical bylaw provision in *Eaton Vance*. They bought shares in 2022. They could have sued then. So they have known about this bylaw provision from the day they purchased, and they did nothing. They did nothing.

So the notion that, you know, somehow their lack of engagement with us is justifiable or they were waiting for something to happen that would trigger their right to a lawsuit, we think is really, really misplaced.

THE COURT: Mr. Mundiya, what's the justification for having -- for allowing a plurality vote of shares present for

uncontested elections but requiring a majority of all -- most shares standard for contested elections, if not to keep challengers from coming forward to replace members of the board?

MR. MUNDIYA: So we have two standards: The majority of the votes present for uncontested elections, and the majority of the votes outstanding for contested elections.

Where you have a contested election, it's -- there's going to be dramatic change or certainly potential for dramatic change, and here you are going to have, in 2024, a potential change of control where all seven trustees are out. When you have -- when you have dramatic change on the table, it is entirely reasonable to make sure that you have a broad swath of shareholder support, and that support can be people voting, but it can also be, as I said at the outset, people saying, with full knowledge of the voting structure, I'm staying home because I like the status quo.

And so when you have dramatic change on the table, like a change in control, the board believes -- and this is common in most fund complexes, there's nothing unique to BlackRock. This is common that when you have dramatic change on the table with board change and board refreshment, and potential changes of control, and potential changes of investment policies, that you want a broad swath of shareholder support. That's why you have a broader threshold, where you

have an uncontested election, and that is not on the table. That's where you have a different standard.

THE COURT: I've sort of two, kind of two offshoot questions from that question.

MR. MUNDIYA: I think I said majority votes present. I think I meant to say plurality. I apologize.

THE COURT: Yes. I was going to ask you about that.

MR. MUNDIYA: Right. No. I apologize.

THE COURT: My first question is, is it a problem or what should I make of the fact that, in effect, the uncontested election is like supercharged because of broker voting rules? So I recognize, or not, BlackRock's creation or ECAT's creation, but certainly an entity like BlackRock is well aware of the restrictions on broker voting, so that in a situation where there's not really a choice and it's just thumbs up or thumbs down, brokers can vote all their street name shares, right, without securing individualized directives from shareholders.

MR. MUNDIYA: In an uncontested --

THE COURT: Right. In an uncontested. So the plurality of all shares present rule is in effect kind of supercharged by the existence of that broker rule, which I know, again, is not of BlackRock's or ECAT's making, whereas in the contested election scenario, having a majority of all shares outstanding rule is really -- again, because the

comparison between the two is actually more stark than it appears on its face, because of the operation of these broker voting rules.

Should I give that any weight at all?

MR. MUNDIYA: No. None. None. Because that's the standard that has been in the industry for years. It's a standard that the SEC has known about for years. And when -- the only vehicle through which you might look at that is section 18(i), which is where they -- where this is relevant to them. And with respect to 18(i), every share has an equal vote.

THE COURT: Right. In either situation --

MR. MUNDIYA: That's right.

THE COURT: Every share has an equal --

MR. MUNDIYA: That's right.

THE COURT: My second sort of sub-question is I think BlackRock would concede that the voting structure of ECAT now contains a status quo bias, and so my question to you is, is there anything about a structural status quo bias itself that is inconsistent with the '40 Act?

MR. MUNDIYA: No, your Honor, there isn't. The status quo bias is a function of lack of engagement, but it's also consistent with Maryland law, which is I think where you look to. And unless there was -- unless there's something express that says status quo bias is somehow inappropriate or wrong or

a problem, I don't think you can imply anything into the '40 Act that attacks or, you know, questions or makes relevant status quo bias.

And a status quo bias, by virtue of voting standard, because I think that's what we're talking about, a status quo bias by virtue of voting standard, and if you look at other provisions of the '40 Act which lay out a voting standard, if Congress wanted courts to take into account a status quo bias, presumably they would have laid out something about a voting standard in 16(a), which governs election of directors, or 18(i), which governs voting rights, but they didn't. They did in other sections.

So I don't think a status quo bias is relevant for a '40 Act analysis vis-a-vis an election of directors. I don't think it's relevant. It may be relevant under state law, perhaps, but certainly not under the '40 Act.

THE COURT: The Second Circuit's commentary in *Nuveen*, whether holding or dicta, we can debate, but the commentary, that suggests that you have to look behind the rules to assess whether the function of rules is to privilege management over shareholders. Does that change the inquiry into whether a status quo bias presents a problem under the '40 Act?

MR. MUNDIYA: We don't think so. In fact, if you look at *Nuveen* and the legislative history of the '40 Act, we think it's pretty clear that there are two sort of -- two issues that

Congress was looking at, the concentration of minority stock holders or affiliated interests and management interests, and both were viewed to be pernicious. And so while there was some dicta to be sure in *Nuveen*, given the way *Nuveen* was litigated, control -- in the context of a controlled shares challenge, which is why I think the *Nuveen* court said some of the things it said, but when you go behind *Nuveen* and you look at the legislative history of the '40 Act, as we lay out in our briefs, I think it's pretty clear that the pernicious acts that Congress was looking at when the '40 Act was passed was not just management entrenching themselves or preserving their power, but also the concentration of affiliated interests, large affiliated interests, like my friends on the other side.

And while we're on *Nuveen*, your Honor, the notion that they couldn't, say, bring this claim because they had to see what might transpire in 2023 and 2024, *Nuveen* destroys that argument. *Nuveen* makes it crystal clear that when you have a contract right and your contract rights are impacted, when your voting rights are being impacted, you have concrete and imminent injury at that point.

They had that injury, frankly, in 2022 when they bought their shares, because that's, when, quote, it became, in their words, impossible for them under the majority vote standard to get their trustees, their nominees elected. That's when they were harmed. That is when the cause of action for

breach of contract would have accrued, if that was a claim.

THE COURT: But isn't that a bit of a distortion of Saba's claim? Right? Because in response to my questioning, I think Mr. Musico acknowledged that the claim really is an "as applied for" in practice claim, that it's not so much that the rule on its face is improper, because you could well imagine a situation where let's say there were four Saba's.

MR. MUNDIYA: Right.

THE COURT: They bought up -- four shareholders controlled the shares, and everyone engaged, and then, in practice, having a majority of all shares outstanding election would produce an effective election, because four people who are all engaged, motivated shareholders would make it achievable to have an election that produces a winner.

So I think the nature of their claim is that what we -- we needed to produce some evidence that, in the context of this fund, despite enormous effort and resources by both BlackRock and Saba, that it's structurally impossible to have a real -- a contested election that produces a winner. That means that, in practice, the operation of this fund cannot comport with the '40 Act, and so isn't -- if that is the claim, if I've fairly stated that as the claim, then isn't it true that the earliest that that particular claim could have arisen is sometime in the summer of 2023?

MR. MUNDIYA: That assumes a world in which *Eaton*

Vance never existed, because that's -- they knew about the voting majority vote by law and the supposed impossibility of getting to that standard in 2020 when they asserted those claims, and so --

THE COURT: But they hadn't tested it in the ECAT context, right?

Because I recognize, I've read the affidavits and I understand there were some -- we're like, oh, this is an endemic problem to close down the fund, but it doesn't seem to me that that's necessarily true because, again, if you imagine a world in which you have Carl Icahn and Saba and a number of other "activist shareholders" decide, you know what, we're going to fight this out, and we're going to buy up the shares and a number of these exemplar funds of this type, that it's not impossible to me that the rule and practice could function effectively in a fund.

Do you understand what I'm saying?

MR. MUNDIYA: I totally understand what you're saying, and in an abstract world, I think your Honor is right. But what we're dealing with here is a complaint in which they say that they're seeking to declare the bylaw void. That's what they say, under the Second Circuit's decisions in *Phoenix*, where you have a contract claim, they're seeking revision of a contract, that's the only claim they have, 47(b), in a contract claim, you bring a claim, your cause of action accrues when the

breach occurs, and their claim is the breach occurred because we have a bylaw that they say is impossible. Their words. They say it's impossible to meet that standard.

Well, nothing changed between the day they filed the loss in *Eaton Vance*, the day we disclosed in 2021 that we had this bylaw, the day that they bought shares in March of 2022. I mean, nothing has changed. The only thing that's changed is that they decided that they want -- they have an election, and they're trying to use the '40 Act to see if they can get an advantage in this court. That's all that's changed.

We don't think that anything vis-a-vis the cause of action has changed. They have asserted the possibility of the void position from day one everywhere. In fact, your Honor, if you look in our briefs, they sued my clients in Delaware in 2019 saying that the majority vote bylaw was a breach of fiduciary duty. So the notion that this is an epiphany in the summer of 2023, it's a fiction.

I have addressed 18(i), statute of limitations. I think you have my position, that the cause of action accrued when the contract executed. We don't think *Williams v. Binance* applies, because that's a unique case where, to have a cause of action in the Exchange Act, your Honor, you need to actually have a transaction, and there was no transaction in that case under the Securities Exchange Act, I think it was the 34 Act, until there was an actual transaction. And here, of course,

the transaction is the purchase of the shares and the assertion that our bylaw is impossible to satisfy. So we don't think *Binance* applies.

Briefly, briefly let me turn to irreparable harm. And I would encourage your Honor, if you haven't already done so, to read Judge Nathan's decision in *Silverstein*. Judge Nathan's decision in *Silverstein*, when -- as she applies the *Ebay* case and the *Sallinger* case, I think that really demonstrates why they are dead wrong on irreparable harm, because what they're saying is that there is a per se presumption of irreparable harm whenever you have a dispute in the electoral context. Not true. Not true.

I think, as Judge Nathan says in *Silverstein*, it's a contextual, fact-by-fact analysis. And, according to *Ebay* and *Sallinger*, you have to show specific, concrete irreparable harm. And here the only cases they cite are the cases in which -- the *Pell v. Delaware* state case, where the two seats that were up for election were literally taken out. There was no -- there was no way you could get into those seats. *Newton*, the Massachusetts case, they specifically changed the meet, the voting date in contravention of the bylaws, took them away, eliminated the shareholders' right to get any representation.

Here we have a majority vote bylaw that's been in place for years, with directors, trustees who are holdovers, and they will continue to be holdovers. And this can go on,

and if your Honor decides the case has some legs under 12(b)(6), we don't think it does, but if your Honor decides that it does, then the case can continue in the ordinary case. And if, in the unlikely event you find that somehow we violated 16(a) or 18(i) under some new vote standard, the way this normally happens is maybe you have a new election, new election with new rules, and we'll figure it out. But there is no basis to give them a new vote standard, because that is what they're asking for.

Now, Mr. Musico was -- I think he did a nice job answering your question, but your question was a good one, which was what standard applies here. And he said, well, he's not asking for any standard to apply. Well, we can't go into the election with no standard to apply. He's essentially asking you for an order that asks -- tells us, tells us to apply a majority of the votes present standard. That is a changing of status quo, and there is no basis, certainly in 16(a) or 18(i), the only claims asserted for that type of drastic mandatory relief.

Your Honor, we have some cases on delay. I think, you know, I've addressed delay. I've addressed res judicata. We can rest on our briefs --

THE COURT: I would be interested -- I mean, I'm interesting in hearing anything you'd want to say, Mr. Mundiya, but I don't know if you remember my questions to Mr. Musico

about what is the correct lens to view the balance of equities or balance of hardships, like who is on the other side of the scale from Saba. If you could --

MR. MUNDIYA: I do.

THE COURT: -- talk a little about that, I'd appreciate that.

MR. MUNDIYA: Well, there are three constituencies here I think. One is obviously, you know, there's is a point of view and they obviously prefer their point of view. Then there is the point of view of the trustees who are there to protect all shareholders, right, in the shareholders who bought into the structure, relying upon long-term distributions, long-term investment horizon, the hope that there wouldn't be liquidation, which would create adverse tax consequences if someone like Saba took control.

So the board of trustees has a fiduciary duty under Maryland law to look out for the interests of the mass of retail stockholders that don't have the ability to organize like an investment hedge fund like Saba, that don't have the ability to get together and file lawsuits. So we, BlackRock, the trustees, have a fiduciary duty to those investors. Those investors I think have an interest.

The other important interest I think is a regulatory interest. I mean, the SEC -- this is a regulated entity, and as I said at the outset, there is a standing issue here. So to

the extent there are public policy issues here about whether federal law preempts state law given the SEC has issued no action letters in *Nuveen* and *ICI*, and Congress has changed the '40 Act numerous times but hasn't touched those provisions, we think the SEC has an interest here if there's going to be any upsetting of the structure of closed end funds, which is what they are essentially asking you to do.

So I think the balance of hardships, the public interest clearly is in our favor, and certainly not decidedly in their favor given that they're a minority stockholder trying to change status quo.

Does that answer your question?

THE COURT: Yes. Yes. Thank you.

MR. MUNDIYA: Okay.

THE COURT: Sorry. I just want to make sure that I don't have other questions for you that I haven't asked.

Is there anything else that you would like to say, Mr. Mundiya?

MR. MUNDIYA: No. We rest on our papers for the rest.

THE COURT: Okay. Terrific. Thank you very much. It was very helpful.

MR. MUNDIYA: Thank you.

THE COURT: Mr. Musico.

MR. MUSICO: Thank you, your Honor. I will try to be brief.

First, I want to start with defendants' slide three about section 16(a) of the Act. It conspicuously omits two of the most crucial provisions in section 16(a), specifically, the last paragraph. Defendants still offered no explanation for how their approach to governing ECAT can be consistent with section 16(a)'s mandate that the term of office of at least one claim class shall expire each year. That's not on their slide three. Or how it can be consistent with 16(a)'s mandate that if at any time less than the majority of the directors of such company holding office at the time were elected by the holders, then the fund has to hold an election to fill those seats. That's never addressed in defendants' argument. Again, conspicuously missing from their slide.

Then, looking at slide four, where they try to argue that the appointment by the initial shareholder, BlackRock, the epitome of an insider of this fund, was sufficient to render these directors elected forever. For one thing, these are provisions of the Maryland code and ECAT's bylaws, not federal law. And they are provisions that refer to taking actions on behalf of the fund, quote, without a meeting, in direct conflict with section 16(a) that says, directors have to be elected at an annual or special meeting.

They're saying these are the things they're authorized to do under Maryland law, under the bylaws, in lieu of a meeting, but federal law clearly requires to do those things at

an actual meeting.

Your Honor asked Mr. Mundiya if defense would recognize if this just continued forever, if you just had failed election after failed election after failed election, is there ever a problem. I think at one point Mr. Mundiya conceded that at some point there would be an issue. I still don't think he ever specified when, but he said at most it would be a regulatory issue, it would be one for the SEC. But there is no theoretical foundation for that position other than this argument that Saba is not entitled to seek injunctive relief.

So, for one thing, even if Saba somehow is not entitled to a preliminary injunction, there's no reason that the private right of action established by *Oxford* and *Nuveen* would be inapplicable to Saba to render a harm under section 16(a). But, on that topic of the injunction, your Honor, we largely rest on our papers on this, but we think that the Supreme Court's decision in the *TAMA* case, the Second Circuit's decision in *Oxford*, and the Second Circuit's decision in *Nuveen*, all make clear that the private right of action for recision must come with all of its customary legal incidents.

There is no reason that this private right of action -- and this was, you know, specifically an issue of *Oxford*: Is it limited to just a remedy? And the whole point of the Second Circuit's decision in *Oxford* is, no, it is a

private right of action. And there is no reason that this private right of action would not come with its customary incidents of equitable relief.

You can see that as well all the way back in the *Dechert* opinion from the Supreme Court. This is 1940. It's cited in our reply brief at 30. It refers to litigants under the Securities Act having the power to utilize any of the procedures or actions normally available to a litigant according to the exigencies of a particular case.

This Court always has wide equitable discretion to grant appropriate relief upon finding violations of the securities laws. So, if your Honor agrees with us that we have demonstrated a strong likelihood of success on the merits with respect to our 16(a) claim, there is absolutely no reason this Court -- that the remedy of unavailable -- excuse me, that the remedy of injunctive relief is unavailable to Saba.

There was some discussion about the '40 Act, and the status quo, and whether standards that favor the status quo are offensive to the '40 Act across the board. Once again, your Honor, the '40 Act is clear, and Congress was clear about the extent to which defensive mechanisms that favor status quo are available.

One of the classic forums of a defensive mechanism that favors the status quo is, again, written into section 16(a) itself. That's the classified board. That's a classic

way that a fund can prevent changes in management from happening overnight.

THE COURT: You mean staggering the -- like having staggered --

MR. MUSICO: Exactly.

THE COURT: There's essentially no limit on the amount of staggering, right?

MR. MUSICO: Well, it's even better than that, your Honor. There is, and Congress was explicit about it. Directors can serve for a period of no shorter than one year or longer than a period of five years as long as the term of at least one class expires each year.

THE COURT: That's what I mean. You could have each individual director be in a separate class, so that --

MR. MUSICO: That's sound --

THE COURT: I mean, I'm not good at math. That's why I'm a lawyer. But you could have -- you could maximize the number of classes so long as the math worked out to fit within this no less than one year, no more than five, to minimize the number of directors that would be subject to election each year.

MR. MUSICO: That's correct. That's right, your Honor.

And, again, the point here is that is a form of status quo bias that is written into the statute itself. It's so

funds, if they choose, can make sure that management of the fund does not turn over overnight in a single election, right? That it at least has to take place over the course of several years.

But, again, and this is where Mr. Mundiya had no answer of how you solve this problem, at least one term expiring each year, or at least when that becomes a problem, but it's -- again, it's written into section 16(a) itself. It tells you that the problem starts when you have less than two-thirds of the directors actually being elected, at which point you can't just fill vacancies willy nilly. And it really comes to a head when you have less than half of the directors actually elected, and, at that point, the remedy that Congress specified is clear, there has to be an election.

And so, again, it's not a -- it's not a mystery. We're not looking to the vagaries of state law to figure this out. Congress made it clear, here's the extent to which we're willing to tolerate some status quo bias, and here's when that bias can't be tolerated and you actually need to have the shareholders come in and elect their directors.

On the topic of timing, your Honor, I candidly don't -- I'm not sure I understand the argument about *Nuveen*, but if you look at the decision, specifically starting at I think it's page 111, the standing analysis, the whole frame of the Second Circuit's analysis was about Saba's ability to come in in

advance of harm occurring, in advance of the violation occurring to seek relief to prevent that harm from coming to pass.

So *Nuveen* was focused on remedies of future violations. That's the point at which the claim would actually accrue and the statute of limitations would begin to run. These aspersions about *Eaton Vance* -- and we came in a year before this case and challenged *Eaton Vance's* majority about standing bylaw. Again, there, the context is so important, your Honor, and you can see all of this in the Court's summary judgment opinion in the *Eaton Vance* case, but just like in this case, I think the way I put it before is we are in the scrum. Saba was in the thick of contested elections and votes with *Eaton Vance*.

The suit in *Eaton Vance* followed after a declassification vote in one fund, where no side got to -- got the votes of 50 percent of the shares outstanding; a director election in another fund, where none of the candidates got the votes of 50 percent of the shares outstanding; and then after those things occurred, *Eaton Vance's* board -- it was a situation of changing the rules. So after those things happened, *Eaton Vance* raises its threshold for electing directors, and then *Eaton Vance* sues Saba to get a declaration that that's A okay. And this was all on the eve of another set of director elections that were upcoming.

So, again, it's not this situation that Mr. Mundiya is describing where a shareholder is just supposed to invest in a fund and take a look at the voting standard and say, you know, someday down the road I might want to run on a contested election, I better sue them right now. They were in the thick of it. And that's exactly the situation here.

THE COURT: Well, I mean, it's also -- would you agree with my characterization of the essential nature of Saba's claim in response to Mr. Mundiya's point that Saba's complaint is not so much about the standard itself, which theoretically could comply with the '40 Act, but, rather, sort of the lived experience of this fund in particular, and maybe all funds of this type, is such that, in practice, no election that comports with the '40 Act, either in its terms or its intention, can occur under these rules? And so merely knowing of the rules' existence at the time that the shares were purchased doesn't necessarily give rise to the claim that you're bringing now.

Is that right?

MR. MUSICO: Your Honor, I think that's right. The only reason I'm hesitating is that I don't want to suggest that a facial challenge is necessarily impossible.

THE COURT: I'm not asking you to give anything away.

MR. MUSICO: But --

THE COURT: No one's asking you to abandon anything.

MR. MUSICO: But I can tell you you're absolutely

right about Saba's position in this case. It's that the standard is not attainable in ECAT, and the lived experience in ECAT establishes that.

Again, we've submitted the declaration from Mr. Grau in part to give you some context for that phenomenon, to give you some comfort that what we're saying is not totally whacky. This is usually what happens when these types of funds use this type of voting standard.

But, absolutely, our challenge here, the violation that we're asserting is that defendants violated the Act when they allowed these directors to continue serving without being elected, and the structural reason that that happened is this voting standard. And so, you know, to give some context to that, too, you had a colloquy with Mr. Mundiya about, well, can the board just kind of dissolve into nothing. I think that might actually happen, your Honor, if an investor came in and sought to rescind the holdover provision.

And that was one of the concerns that the Fourth Circuit had in *Badlands*. Right. The Court was saying, well, look, if I'm faced with the choice of letting these holdovers remain for a bit or we're dissolving the fund, I don't see any indication from Congress that the fund has to dissolve. But section 16(a) -- again, we're only talking about the first two directors in *Badlands*. If that kept happening and the fund fell below this threshold, it may well be that the funds would

have to dissolve if you rescinded the holdover provision.

There is an alternative, and, again, Saba is here not trying to be obstructionist, not trying to just force the fund to dissolve. This structural impediment to those directors actually getting elected is the voting standard, and so that's why that's the target of this lawsuit. It's so we don't have to face this situation where the board slowly, you know, shrivels into oblivion and the board has to dissipate. If so, the shareholders can actually vindicate their right to elect directors as contemplated by 16(a).

But now the reason this dissolution point is -- it can happen, and it's, you know, slide seven of defendants' presentation where they talk about this standard for approving the contract of the investment advisor, and whether it needs to be approved by a vote of the majority of the outstanding shares. What happens if the investment advisor doesn't get to that standard of a vote of the outstanding shares? They can't keep serving as the investment advisor. They don't just get to hold themselves over and continue to run the fund. If the fund ends up without an investment advisor and the directors decide that they can't run the fund without an investment advisor, guess what, it has to dissolve.

And so that's a structural feature of these types of voting standards, and it's actually the situation that defendants have created for themselves. But it's totally

unnecessary. It's illegal. And this Court should not allow them to force that result on the fund.

On the topic of irreparable harm, just briefly, Judge Nathan's opinion in *Silverstein* is not the "get out of jail free" card that defendants are hoping for. That case, for one thing, was not about electing directors. It was a case about disclosures with respect to political spending, and Judge Nathan, consistent with lots of other cases, held that holding an under-informed vote does not necessarily result in irreparable harm. You have to look at the context and what that means for the vote and the implications for the fund.

And here's maybe the most important thing, the plaintiff in that case did not actually seek to stop the political spending that was the subject of the disclosures, that might have been the thing that would have been hard to unwind. But the plaintiff was just seeking the information, not seeking relief from the consequences of the vote.

But I misspoke when I said that was the most important thing. The most important thing is that it wasn't a case about electing directors. As we talked about before, your Honor, cases are legion that -- in every jurisdiction, that depriving shareholders of their right to elect directors necessarily effects irreparable harm. And Mr. Mundiya said it himself when he described *Pell*. He characterized the issue in *Pell* as the incumbents in that case, the defendants in that case making it

so there was no way you can get into those seats. That's the way he described the situation in *Pell*, there was no way that anyone could get into those seats. That's exactly the situation we have here, as a result of the majority --

THE COURT: Well, I appreciate the effort, but there is a difference between it's actually impossible, structurally impossible, and I think the argument that Saba's advancing, which is that it's a practical impossibility, that the experience of the last year and the other evidence gathered from the industry generally makes the likelihood so vanishingly small that -- I mean, I recognize where you're going is that there's a convergence point, right, between vanishingly small as a practical matter and structurally impossible, but I think I would just urge you to be careful about conflating those things, even though I understand that part of the argument is that you were practically converging on that point and that you've adequately shown the convergence point has been reached, right, but they're really not the same.

MR. MUSICO: So, your Honor, I take your point, but the relevant piece of it, for purposes of the harm to shareholders, is that we're not -- we're not engaged in a predictive exercise anymore, at least to last year's election, and then even as to this year's election. Given that they haven't even attempted to contest our evidence, you have to take that predictive exercise as true, so the facts on the

ground are that neither the challenger nor the incumbent can get into the seats. And that is the harm to the shareholders, and that is exactly what is prohibited by section 16(a).

And it is the -- it is the phenomenon that even though accomplished by other means in some of these other cases, causes the same form of irreparable harm to the shareholders, that they end up in a fund that is governed by directors who have not been duly elected and who have merely installed themselves in office by their own fiat.

Your Honor, a last point very quickly on the equities. So I will again come back to -- I will try not to repeat myself, but, very briefly, footnote 18 of the *Nuveen opinion*, it just so clearly lays out where this balance comes out between the interests of so-called concentrated investors acquiring control of investment companies and management's inequitable entrenchment mechanisms. And the Second Circuit specifically said that even assuming some tension between those concepts, you have to take the overarching theme expressed in the legislative history, and the SEC reports that of primary importance to the investor is this opportunity to supplant the management of his investment company when the conduct of those representatives no longer meets with his approval.

And in terms of, you know, if one side or the other has their nominees in office, the difference is that the fundamental relief Saba is seeking is to have directors in

office who are actually elected. And so if this Court grants relief, you're not installing Saba's nominees as directors of the fund. As we've discussed, you're not dictating any particular voting standard. You're telling the incumbent directors, hey, set a standard that actually allows someone, anyone to be elected by the shareholders as required under the Act.

And what comes out of that, they suspect that whatever standard they get to, Saba's likely to win, right? If that happens, what we will at least have is a situation where the directors in office have actually been elected by the shareholders, and we'll be operating under a voting standard where shareholders don't like what they're doing, they'll actually have an opportunity to vote them out.

And with respect to this idea that only the incumbent director can possibly look out for the interests of all of the shareholders in the fund, as soon as Saba's nominees are elected as directors of the fund, they will have exactly the same fiduciary duties to act in the best interest of the fund as every other director would. So this idea that, again, they can just run roughshod over the fund and favor Saba's interests over everyone else's is not the law. It's not the reality.

But the most important feature of the balance of the equities with respect to the relief you would be granting is that you would have the comfort of knowing that whatever

directors end up in office of this fund are actually directors who have been affirmatively elected by the shareholders.

THE COURT: Before you sit down, Mr. Musico, let me ask you a technical question.

Does Saba have an objection to me taking judicial notice of the written consent shareholder document that is attached to the -- either in the context of the motion to dismiss or -- I recognize it's outside the pleadings, but it seems to me an uncontested document.

Can I take judicial notice of that document?

MR. MUSICO: You absolutely may, your Honor.

THE COURT: Okay.

MR. MUSICO: Because, as we've discussed, we think that consent only highlights the illegality of it.

THE COURT: Right. I'm not asking you to concede anything as to what weight or import I should give to that document. I just want to make sure you don't have an objection to me considering it, even though it's outside the pleadings.

MR. MUSICO: No. No objection.

THE COURT: Thank you very much.

Mr. Mundiya, do you want a brief --

MR. MUNDIYA: Very brief.

THE COURT: I see you desperate to stand up, so go ahead.

MR. MUNDIYA: Not desperate, but just a minute.

On this notion that it's not a facial challenge, if you look at the Grau Declaration, it's virtually identical to the challenges they had in the *Eaton Vance* case. And the Grau Declaration, again, we think it's speculative. We don't think it's -- it's really relevant to a '40 Act analysis, but even Grau, even Grau, you know, says that there are instances when you can meet the '40 Act -- the majority votes outstanding standard, and he assumes, if you read it, a 50 percent participation rate. He also says, the mean participation rate is 62 percent, and then he says he's had participation as high as 75 percent.

If you use those higher participation rates, then the percentage of shares present to get to a 50 percent number is much, much lower than the numbers they talk about. So this notion of impossibility and the convergence that you spoke about between the *E.R. Newton* case and what we have here, when you look at some of the things that Grau actually says, you're not converging as quickly as -- as closely as Mr. Musico indicated. There's actually a gap. There's actually a gap.

If you -- if you question some of Grau's assumptions, which we do, but -- again, the reason we don't want to elaborate on that is because we don't think it really helps you interpret 16(a) and 18(i), which we think are clear on their face.

THE COURT: Thank you.

MR. MUNDIYA: Thank you.

THE COURT: Last word.

MR. MUSICO: Thank you, your Honor.

THE COURT: Okay. I found this extremely helpful, so I really appreciate the time and the excellent advocacy. We'll try to get you a decision as soon as we can.

We're adjourned. Thank you.

(Adjourned)